

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KEITH WALKER, individually, and as parent
and guardian for D.W., a minor, and
CLEMENCIA WALKER,

Plaintiffs,

v.

KING COUNTY, a municipal corporation,
acting through the KING COUNTY
SHERIFF'S OFFICE, and MARYLISA
PRIEBE-OLSON, and PAUL AIO, and the
STATE OF WASHINGTON, by and through
its agency, CHILD PROTECTIVE SERVICES,
and EDGAR DUBOSE,

Defendants.

Case No. C08-0549-JCC

ORDER

This matter comes before the Court on King County Defendants' ("Defendants")
Motion for Qualified Immunity and for Summary Judgment (Dkt. No. 33), Plaintiffs' Response
(Dkt. No. 46), and Defendants' Reply (Dkt. No. 51). Having thoroughly considered the parties'
briefing, declarations, and the relevant record, the Court finds oral argument unnecessary and
hereby GRANTS IN PART and DENIES IN PART the motion for the reasons explained
herein.

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1 **I. BACKGROUND**

2 This case stems from a custody dispute between Plaintiff Keith Walker and his former
3 partner, Kamla Patton, over their son, D.W. (*See* Dubose Decl. ¶ 9 (Dkt. No. 39).) Ms. Patton
4 originally had custody over D.W., but after numerous investigations by Child Protective
5 Services (“CPS”) into allegations of neglect and substance abuse, Mr. Walker obtained custody
6 in 2003. (*See id.*; K. Walker Dep. 75 (Dkt. No. 48-3); *see generally* K. Walker Dep. 57–77
7 (Dkt. No. 48-3.) Before the incident at the heart of this case, thirteen allegations of abuse and
8 neglect had been made against Ms. Patton. (*See* Dubose Decl. ¶ 9 (Dkt. No. 39).) Ms. Patton
9 appears to have also made several unfounded allegations concerning Mr. Walker’s parenting.
10 (*See id.*) Before the relevant incident, CPS had received nine allegations concerning Mr.
11 Walker; CPS investigated four of these allegations, three of which were determined to be
12 unfounded and one of which was determined to be inconclusive. (*See id.*; 6/28/05 CPS Referral
13 4 (Dkt. No. 48-14).)

14 On June 28, 2005, Ms. Patton called CPS to allege that Mr. Walker had choked D.W.
15 and had threatened him with a gun. (6/28/05 CPS Referral 3 (Dkt. No. 48-14).) CPS designated
16 the referral with a risk tag “moderate” (*id.* at 2), which is the lowest level of referral that
17 requires a social worker to make contact with the child (Dubose Decl. ¶ 7 (Dkt. No. 39)). In
18 explaining the risk assessment, the referral noted that there were “[n]o founded CPS priors on
19 father” and that the findings as to the remaining allegation had been inconclusive. (6/28/05
20 CPS Referral 6 (Dkt. No. 48-14).) In fact, Ms. Patton had made an extremely similar allegation
21 back in February 2003, when she claimed that Mr. Walker had a gun and threatened to kill
22 D.W. (*See* Intake Summary Report 8 (Dkt. No. 48-9 at 9).)

23 On June 30, two days after receiving the report, CPS assigned a social worker named
24 Edgar Dubose to investigate the allegations that Mr. Walker had abused D.W. (Dubose Decl.
25 ¶ 8 (Dkt. No. 39).) Later that day, sometime before 2:22pm, Mr. Dubose contacted Officer
26 Marylisa Priebe-Olson, a Detective with the King County Sheriff’s Office, to seek her help in

1 investigating the allegations. (6/28/05 CPS Referral 8 (Dkt. No. 48-14); Priebe-Olson Decl.
2 ¶¶ 1–2 (Dkt. No. 36 at 1–2).) Mr. Dubose and Officer Priebe-Olson discussed the case, and
3 they agreed to visit Mr. Walker’s home together at 10:00am the following morning. (6/28/05
4 CPS Referral 8 (Dkt. No. 48-14).) Mr. Dubose was familiar with the previous unfounded
5 allegations made by Ms. Patton against Mr. Walker (Dubose Decl. ¶ 9 (Dkt. No. 39), and he
6 appears to have discussed with Officer Priebe-Olson both the ongoing custody dispute and Ms.
7 Patton’s history of making unfounded referrals. (Priebe-Olson Dep. 13:9–14:1, 19:18–19:22
8 (Dkt. No. 48-5 at 4–5).) In preparing for the visit, Officer Priebe-Olson checked Mr. Walker’s
9 criminal history and discovered that he had previously been convicted of a felony. (*Id.* at
10 14:23–15:3.)

11 The following day, Mr. Dubose met Officer Priebe-Olson and Officer Paul Aio at Mr.
12 Walker’s home. (Dubose Decl. ¶ 12 (Dkt. No. 39 at 4).) At this point, the parties’ accounts of
13 the events diverge sharply. Mr. Walker claims that, as soon he opened the door, the officers
14 barged into the home, started asking him questions, and demanded that D.W. be interviewed
15 alone (K. Walker Dep. 7:18–9:10, 9:21–10:9 (Dkt. No. 48-3 at 3); K. Walker Decl. ¶ 2 (Dkt.
16 No. 47 at 2) (“I never gave them permission to enter my apartment. I never gave them
17 permission to remain.”).¹) The officers, on the other hand, claim that Mr. Walker invited them
18 into the home and cordially arranged for D.W. to speak to Mr. Dubose in a bedroom. (Aio
19 Decl. ¶ 3 (Dkt. No. 43); Priebe-Olson Dep. 21:17–21:25 (Dkt. No. 48-5 at 5).) The parties
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22 ¹ In their reply, Defendants move to strike Mr. Walker’s declaration on the grounds that
23 it “is not made under penalty of perjury under the laws of the State of Washington.” (Reply 8
24 (Dkt. No. 51).) Although Mr. Walker’s declaration fails to comply with the technical
25 requirements set forth in 28 U.S.C. § 1746, the Court will nonetheless consider it for the
26 purpose of deciding this motion because the declaration primarily repeats, in more convenient
form, the information to which Mr. Walker testified in his sworn deposition. *See Staples v.*
Dep’t of Soc. & Health Servs., C07-5443-RJB, 2009 WL 442074, at *6 (W.D. Wash. Feb. 17,
2009) (accepting an identically deficient declaration for the purpose of deciding a summary
judgment motion on the merits).

1 agree that, in his interview with Mr. Dubose, D.W. denied the allegations that he had been
2 threatened or choked by his father; however, D.W. did divulge that his father had a gun in the
3 house. (Dubose Decl. ¶ 24 (Dkt. No. 39 at 6).) Mr. Dubose relayed this information to Officer
4 Priebe-Olson, who then confronted Mr. Walker about the firearm, which he could not legally
5 possess as a convicted felon. (Priebe-Olson Dep. 30:6–30:12 (Dkt. No. 48.5 at 7).) Mr. Walker
6 had previously told Officer Priebe-Olson that he did not own a gun (K. Walker Dep. 14:17–
7 14:18 (Dkt. No. 48-3 at 5)), but, after being confronted, he apparently explained that the gun
8 belonged to his then-girlfriend, and current wife, Clemencia.² (Priebe-Olson Dep. 33:16–33:24
9 (Dkt. No. 48-5 at 7).) Officer Priebe-Olson allegedly explained that his handling the gun, even
10 if it belonged to Mrs. Walker, still constituted “possession” (*id.* at 44:2–44:7), and she arrested
11 Mr. Walker for being a convicted felon in possession of a firearm (Priebe-Olson Decl. ¶ 8
12 (Dkt. No. 36 at 4); K. Walker Dep. 17:21–24 (Dkt. No. 48-3 at 5)).

13 At this point, the parties against disagree about how the events unfolded. Officer
14 Priebe-Olsen claims that Mr. Walker disclosed that the gun was in his bedroom and consented,
15 in principle, to her removing it; however, because it was Mrs. Walker’s firearm, he allegedly
16 wanted to wait until she returned. (Priebe-Olsen Dep. 33:16–33:24, 45:24–46:2 (Dkt. No. 48-5
17 at 7–9).) According to this version of the events, Mrs. Walker was apologetic when she arrived
18 and willingly retrieved the firearm for Officer Priebe-Olson. (*Id.* at 46:7–47:5.) In contrast, Mr.
19 Walker denies ever having consented to a search of his home for the weapon, instead insisting
20 that he speak with his attorney. (K. Walker Decl. ¶ 3 (Dkt. No. 47 at 3); K. Walker Dep. 18:18
21 (Dkt. No. 48-3 at 6).) Both Mr. and Mrs. Walker allege that Officer Priebe-Olson grabbed Mrs.
22 Walker as soon as she entered the apartment and ordered her to produce the gun, which she
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25 ² Mrs. Walker was apparently named “Clemencia Jackson” at the time of the events in
26 question (*see* Mot. 4 (Dkt. No. 33)), but the Court will refer to her as “Mrs. Walker” for
simplicity.

1 did. (K. Walker Dep. 30:20–30:22 (Dkt. No. 48-3 at 9); C. Walker Dep. 33:24–25 (Dkt. No.
2 48-4 at 4).)

3 Ms. Patton had been scheduled to pick up D.W. for a court-approved visitation at noon
4 that day. (K. Walker Dep. 23:16–23:17 (Dkt. No. 48-3 at 7).) Because Mr. Walker was being
5 arrested and Mrs. Walker had to return to work, Officer Priebe-Olson decided that Ms. Patton
6 should pick D.W. up a few hours early. (Priebe-Olson Decl. ¶ 9 (Dkt. No. 36 at 5).) She claims
7 that “Mr. Walker consented to this logical and appropriate plan” (*id.*), but Mr. Walker denies
8 ever consenting to D.W.’s early pickup (*see* K. Walker Decl. ¶ 5 (Dkt. No. 47 at 4) (“I did not
9 give permission for D.W. to be taken from my apartment.”).)

10 On February 21, 2008, Mr. Walker filed this action in state court against King County
11 and its Sheriff’s Office, Officers Priebe-Olson and Aio, the State of Washington and its CPS
12 agency, and Mr. Dubose, alleging a variety of state and federal law claims. (Compl. 1, 19–22
13 (Dkt. No. 1 at 7, 26–28).) The King County Sheriff’s Office, Officer Priebe-Olson, and Officer
14 Aio (collectively “King County Defendants” or “Defendants”) removed to federal court (Dkt.
15 No. 1 at 1) and have moved for summary judgment on qualified immunity grounds (Dkt. No.
16 33).³ In opposition to the summary judgment motion, Plaintiffs allege five claims for which
17 they argue summary judgment should be denied: (1) illegal entry of Mr. Walker’s home in
18 violation of the Fourth Amendment, (2) illegal arrest of Mr. Walker in violation of the Fourth
19 Amendment, (3) illegal search of Mr. Walker’s home in violation of the Fourth Amendment,
20 (4) removal of D.W. from Mr. Walker’s home in violation of the Fourth and Fourteenth
21 Amendments, and (5) negligent investigation in violation of state law. (Resp. (Dkt. No. 46).)

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25 ³ Plaintiffs have reached a tentative settlement with the State of Washington, CPS, and
26 Mr. Dubose. (Dkt. No. 45.) Those parties are currently seeking court-approval of the proposed
settlement. (*See* Mot. for Approval of Minor Settlement (Dkt. No. 52).)

II. DISCUSSION

Under Federal Rule of Civil Procedure 56(c), summary judgment “should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the [moving party] is entitled to judgment as a matter of law.” A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *In re Caneva*, 550 F.3d 755, 761 (9th Cir. 2008) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). When considering a motion for summary judgment, the Court views the evidence in the light most favorable to the non-moving party. *Id.*

Qualified immunity protects state governmental officials from suit under 42 U.S.C. § 1983 “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The qualified immunity analysis consists of two prongs: First, “[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right?” *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Second, was the constitutional right “clearly established” at the time of Defendants’ misconduct? *Id.*; see also *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (explaining that a right is “clearly established” if the law at the time gave the defendants “fair warning that their [conduct] was unconstitutional.”). The Supreme Court recently held that a district court may consider these two prongs in either order depending on the circumstances of the case at hand. *Pearson*, 129 S. Ct. at 818.

A. Entry into Mr. Walker’s Home

The Fourth Amendment prohibits “unreasonable searches and seizures.” See U.S. CONST. amend. IV. A search is generally “unreasonable” unless supported by both (1) a warrant and (2) probable cause to believe the search will uncover evidence of a crime, yet there are several exceptions to this general rule. See *Mincey v. Arizona*, 437 U.S. 385, 390 (1978).

1 Defendants concede that the entry into Mr. Walker's home constituted a "search"
2 within the meaning of the Fourth Amendment and that this search was conducted without a
3 warrant. (*See* Mot. 8–9 (Dkt. No. 33).) On the other hand, Plaintiffs agree that the warrantless
4 entry into Mr. Walker's home would have been valid if, as Defendants allege, Mr. Walker
5 consented to their entry and invited them into the apartment. (*See* Resp. 9 (Dkt. No. 46).) Here,
6 however, the Court must view the evidence in the light most favorable to Plaintiffs, and
7 Defendants concede that "there is an issue of fact as to whether Mr. Walker consented to the
8 entry." (Mot. 8 (Dkt. No. 33).) Therefore, in deciding whether a genuine issue of material fact
9 exists as to the lawfulness of the officers' entry into Mr. Walker's home, the Court must accept
10 Plaintiffs' account as true.

11 Defendants argue that the entry was lawful even without Mr. Walker's consent because
12 the visit constituted a valid warrantless "welfare check." (Mot. 8–10 (Dkt. No. 33).)
13 Defendants note that the "exigencies" of a situation can render a warrantless search objectively
14 reasonable, and that "[o]ne exigency obviating the requirement of a warrant is the need to
15 assist persons who are seriously injured or threatened with such injury" *Brigham City v.*
16 *Stuart*, 547 U.S. 398, 403 (2006). However, the exception to the warrant requirement described
17 in *Brigham City* only applies when police "have an objectively reasonable basis for believing
18 that an occupant is seriously injured or *imminently* threatened with such injury." *Id.* at 400. In
19 this case, there clearly was no such imminent threat of injury. The officers arrived at Mr.
20 Walker's home three days after Ms. Patton reported the alleged abuse to CPS and over twenty
21 hours after Officer Priebe-Olson herself had been informed of the accusations. (6/28/05 CPS
22 Referral 2, 8–9 (Dkt. No. 48-14).) Officer Priebe-Olson testified in her deposition that it would
23 generally take "an hour and a half to six hours" to obtain a warrant, but no attempt was made to
24 do so even though there was ample time. (Priebe-Olson Dep. 49 (Dkt. No. 48-5 at 9).)
25 Moreover, CPS had designated the referral only as "moderate risk" (6/28/05 CPS Referral 6
26 (Dkt. No. 48-14)), and Officer Priebe-Olson knew that Ms. Patton had a history of leveling

1 unfounded allegations of abuse against Mr. Walker (Priebe-Olson Dep. 13:9–14:1, 19:18–
2 19:22, 81:10–81:22 (Dkt. No. 48-5 at 4, 5, 11)). Finally, Officer Priebe-Olson concedes that
3 when they approached the house, she saw D.W. watching TV and ““c[ould] see that he[wa]s
4 fine’” (Priebe-Olson Dep. 21:17 (Dkt. No. 48-5 at 5)), undermining any claim that they feared
5 D.W. was “seriously injured or *imminently* threatened with such injury.” *Brigham City*, 547
6 U.S. at 400. Under these circumstances, no reasonable officer could conclude that exigencies
7 justified a warrantless, non-consensual entry into Mr. Walker’s home.

8 Defendants next argue that they are entitled to qualified immunity because “as of July
9 1, 2005, there was no ‘clearly established’ federal case law on the exact contours of the right.”
10 (Mot. 11 (Dkt. No. 33).) However, the constitutional right at issue in this case is the
11 fundamental Fourth Amendment guarantee not to have one’s home subjected to an
12 “unreasonable” search, a right established long before 2005. *Silverman v. United States*, 365
13 U.S. 505, 511 (1961) (“At the very core [of the Fourth Amendment] stands the right of a man
14 to retreat into his own home and there be free from unreasonable governmental intrusion.”).
15 The relevant question for qualified immunity purposes is not whether the “exact contours of
16 the right” were absolutely defined (an impossible standard by any means), but instead whether
17 there existed some ambiguity in the case law to render the officers’ conduct arguably
18 reasonable. *See Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). Defendants note that the
19 *Brigham City* case, which was decided after the warrantless entry into Mr. Walker’s home,
20 resolved certain “differences among state courts and the Courts of Appeals concerning the
21 appropriate Fourth Amendment standard governing warrantless entry by law enforcement in an
22 emergency situation.” 547 U.S. at 402. Yet the circuit split that predated *Brigham City* bears no
23 relevance to facts of this case. In that case, the Supreme Court noted that some lower courts
24 applied the “emergency aid” exception whenever the circumstances *objectively* justified
25 warrantless entry, whereas other courts also considered the officers’ *subjective* motivations, *see*
26 *id.* at 404, yet it was clear that either test required “an injured occupant or . . . [threat of]

1 imminent injury.” *Id.* at 403. Because there was absolutely no “emergency” in this case, the
2 “emergency aid” exception would not justify the warrantless entry of Mr. Walker’s home
3 under either formulation; therefore, the circuit split resolved in *Brigham City* does not entitle
4 the officers to qualified immunity.

5 Finally, Defendants claim that “[l]ongstanding Washington case law regarding the
6 ‘welfare check’ exception also provides clear direction to officers to assist people that the
7 officers perceive may be in danger, even where there is not an immediate emergency.” (Mot. 9
8 (Dkt. No. 33).) To support this broad assertion, Defendants cite a single case from the state
9 court of appeals. *See State v. Gocken*, 857 P.2d 1074 (Wash. Ct. App. 1993). In *Gocken*, the
10 state court does appear to recognize an exception to the warrant requirement independent from
11 the “emergency aid” exception described above. *See id.* at 1080 (“[T]he police may be required
12 to perform a warrantless search, *not as a response to an immediate emergency*, but as part of
13 their function of protecting and assisting the public.” (emphasis added).) However, the Court
14 explicitly limited this new exception for “health and safety” checks “to *circumstances in which*
15 *there is no probable cause to suspect a crime is being or has been committed.*” *Id.* at 1080 n.6.
16 In this case, the only reason that Officers Priebe-Olson and Aio had to suspect that D.W.’s
17 “health and safety” might be threatened was the allegation that he had been *assaulted* by his
18 father; therefore, any investigation into D.W.’s safety would necessarily be an investigation
19 into whether or not Mr. Walker had committed a criminal act. By its own clear terms,
20 therefore, the “health and safety” exception described in *Gocken* would not apply to the facts
21 of this case.

22 The relevant case law on July 1, 2005, clearly put Officers Priebe-Olson and Aio “on
23 notice” that, without a substantial threat of imminent harm to D.W., a warrantless, non-
24 consensual search of Mr. Walker’s home could not be justified. Because there are genuine
25 issues of material fact as to Mr. Walker’s consent, the Court DENIES summary judgment as to
26 Plaintiffs’ claim that the initial entry into the apartment violated the Fourth Amendment.

1 **B. Mr. Walker’s Arrest**

2 Although warrantless arrests in public places are generally allowed, *see United States v.*
3 *Watson*, 423 U.S. 411, 417 (1976), the Fourth Amendment requires that an arrest *inside a home*
4 be supported by a warrant unless exigent circumstances existed or the officers had some other
5 lawful reason to be inside the property, *see Payton v. New York*, 445 U.S. 573, 590 (1980)
6 (“[T]he Fourth Amendment has drawn a firm line at the entrance to the house.”). The parties
7 agree, correctly, that the analysis regarding the lawfulness of Mr. Walker’s warrantless arrest is
8 identical to that of the warrantless entry into his home. (Resp. 18–22 (Dkt. No. 46); Reply 2 n.1
9 (Dkt. No. 51).) Therefore, because the officers in this case had neither an arrest warrant, nor a
10 warrant to search the apartment, nor a lawful justification for warrantless entry (assuming,
11 again, that Mr. Walker did not consent), the Court DENIES summary judgment as to Plaintiffs’
12 claim that Mr. Walker’s arrest in his apartment violated the Fourth Amendment.

13 **C. Search of Mr. Walker’s Apartment**

14 Plaintiffs claim that Defendants again violated the Fourth Amendment when Office
15 Priebe-Olson ordered Mrs. Walker to show her where the gun was located. (*See* C. Walker
16 Dep. 33:24–33:25 (Dkt. No. 48-4 at 4).) Defendants argue that the search was reasonable for
17 two alternative reasons: (1) even under Mr. and Mrs. Walker’s account of the events, an officer
18 could reasonably believe that they had consented to the search, and (2) the search was
19 necessary to confiscate the firearm in order to protect the remaining occupants of the
20 apartment. (*See* Mot. 15–16 (Dkt. No. 33).) Neither of Defendants’ claims has merit.

21 In support of their contention that Mr. and Mrs. Walker might have consented to the
22 search, Defendants point to the following passage in Mrs. Walker’s deposition:

23 Q: Did you at any time indicate that she couldn’t search your room?

24 A: No.

25 Q: Did you have any problem with her at that point searching your room for a gun?

26 A: I didn’t even know what my rights is [sic].

1 (C. Walker Dep. 39:10–39:15 (Dkt. No. 48-4 at 6).) However, in the same deposition, Mrs.
2 Walker indicated that Officer Priebe-Olson never asked her permission to search the room (*id.*
3 at 39:6–39:9); instead, she “grabbed” Mrs. Walker and said, “‘I need for you to show me
4 where the gun is’” (*id.* at 33:24–33:25). Defendants have failed to identify, and the Court’s
5 research has failed to produce, any case suggesting that the mere silent acquiescence to an
6 officer’s direct order could be sufficient to infer consent. *Cf. Lopez-Rodriguez v. Mukasey*, 536
7 F.3d 1012, 1017 (9th Cir. 2008) (“We have sustained an inference of consent . . . only under
8 very limited circumstances—i.e., where the officers have verbally *requested* permission . . .
9 and the occupant’s action suggests assent . . . or where prior collaborative interactions between
10 the suspect and the officers make the inference of consent *unequivocal*.” (emphasis added)).
11 Accordingly, the Court finds that, viewing the facts in the light most favorable to Plaintiffs, no
12 reasonable officer could have concluded that the search for the gun was consensual.

13 As to their second contention, Defendants note that a family friend was staying in the
14 apartment with her two toddlers. (Mot. 16 (Dkt. No. 33); Ms. Walker Dep. 29:1–29:19 (Dkt.
15 No. 48-4 at 3).) Defendants quote a single district court case for the proposition that the
16 “‘decision to find and secure the weapon[] was reasonable to prevent harm to the occupants
17 that might have ensued once the defendant officers departed’” (Mot. 16 (Dkt. No. 33)
18 (*quoting Ostroski v. Town of Southold*, 443 F. Supp. 2d 325, 344–45 (E.D.N.Y. 2006)).)
19 However, in *Ostroski*, the Court explicitly relied on the “emergency aid” exception to the
20 warrant requirement and explained that, at the time of the seizure, the two occupants of the
21 residence were in the middle of “a heated domestic dispute.” 443 F. Supp. 2d at 344–45. The
22 Court held that “the search and seizure was reasonable under the emergency aid doctrine
23 because the officers reasonably believed that it was necessary to protect the occupants of the
24 residence from *imminent* injury.” (*Id.* (*citing Brigham City*, 547 U.S. 398) (emphasis added).)
25 In this case, there was absolutely nothing to suggest an imminent threat of harm to the toddlers,
26 who were staying in the apartment under the supervision of their mother. (Ms. Walker Dep.

1 29:1–29:19 (Dkt. No. 48-4 at 3.) Defendants cannot seriously contend that the mere presence
2 of a firearm in a home with children is sufficient to justify a warrantless search of the property.

3 Viewing the facts in the light most favorable to Plaintiffs, Officer Priebe-Olson clearly
4 violated the Fourth Amendment by ordering Mrs. Walker to lead her to the firearm in the
5 bedroom. Accordingly, the Court DENIES summary judgment as to Plaintiffs’ claim that the
6 search for the weapon was unconstitutional.

7 **D. Removal of D.W. from the Apartment**

8 Plaintiffs further claim that Defendants violated their rights of familial association
9 under the Fourth and Fourteenth Amendments by arranging for Ms. Patton, D.W.’s mother, to
10 pick him up early in light of Mr. Walker’s arrest. (Resp. 22–23 (Dkt. No. 46).) As Plaintiffs
11 note, the Ninth Circuit has recognized that “[p]arents and children have a well-elaborated
12 constitutional right to live together without governmental interference.” *Rogers v. County of*
13 *San Joaquin*, 487 F.3d 1288, 1295 (9th Cir. 2007) (quoting *Wallis v. Spencer*, 202 F.3d 1126,
14 1136 (9th Cir. 2000)). Accordingly, “[t]he Fourteenth Amendment guarantees that parents will
15 not be separated from their children without due process of law except in emergencies.” *Mabe*
16 *v. San Bernardino County, Dep’t of Pub. Soc. Servs.*, 237 F.3d 1101, 1107 (9th Cir. 2007); *see*
17 *also Ram v. Rubin*, 118 F.3d 1306, 1310 (9th Cir. 1997) (“[A] parent ha[s] a constitutionally
18 protected right to the care and custody of his children and . . . he c[an]not be summarily
19 deprived of that custody without notice and a hearing, except when the children [a]re in
20 imminent danger.”)

21 The cases upon which Plaintiffs rely each involve the extended removal of a child into
22 the government’s protective custody pending a child abuse investigation, *see Rogers*, 487 F.3d
23 at 1291, 1294 (concerning a two-week removal from parental custody); *Mabe*, 237 F.3d at
24 1105 (concerning a four-year period of non-parental custody); *Wallis*, 202 F.3d at 1131
25 (concerning a two-and-one-half-month removal from parental custody; *Ram*, 118 F.3d at 1310
26 (concerning a four-day period of protective custody), and it is not at all clear that their

1 reasoning would apply to the facts of this case. Here, Mr. Dubose, Officer Priebe-Olson, and
2 Officer Aio met at Mr. Walker's home at 10:00am on July 1, 2005. (6/28/05 CPS Referral 8
3 (Dkt. No. 48-14).) Ms. Patton was scheduled to pick up D.W. for a court-appointed visitation
4 at noon on that same day. (K. Walker Dep. 23:16–23:17 (Dkt. No. 48-3 at 7).) Because Mr.
5 Walker was being taken into custody on criminal charges and Mrs. Walker was going back to
6 work, the officers felt that it would be prudent to have Ms. Patton pick up D.W. early. (Priebe-
7 Olson Decl. ¶ 9 (Dkt. No. 36 at 5).) In light of the fact that D.W. was going to be separated
8 from Mr. and Mrs. Walker for those few short hours either way, it is difficult to see how the
9 police officers' arrangement of an early pickup implicated the constitutional rights of
10 "[p]arents and children . . . to *live together* without governmental interference" and to "not be
11 *separated* . . . without due process of law." *See Rogers*, 487 F.3d at 1294 (emphasis added)
12 (internal quotations omitted). Even viewing the evidence in the light most favorable to
13 Plaintiffs, the Court cannot say that the officers' conduct violated a "clearly established"
14 constitutional right. Accordingly, Defendants are entitled to qualified immunity and the Court
15 GRANTS summary judgment as to Plaintiffs' claim that the early removal of D.W. from the
16 apartment violated the Fourth and Fourteenth Amendments.

17 **E. Negligent Investigation**

18 Plaintiffs finally claim that Defendants are liable for negligent investigation under
19 Washington state law. (Resp. 23 (Dkt. No. 46).) Washington Revised Code 26.44.050 provides
20 that "[u]pon the receipt of a report concerning the possible occurrence of abuse or neglect, the
21 law enforcement agency or the department of social and health services must investigate and
22 provide . . . a report" The Washington Supreme Court has interpreted this statute to
23 impose a "mandated duty to investigate child abuse allegations" and has held that children and
24 their parents can bring negligent investigation claims to remedy breaches of this duty of care.
25 *See Tyner v. Wash. Dep't of Soc. & Health Servs.*, 1 P.3d 1148, 1153, 1154–55 (Wash. 2000).
26 Plaintiffs argue that Defendants are liable for negligent investigation because the officers

1 “entered [Mr. Walker’s] home, arrested Mr. Walker in front of his son, removed D.W. from his
2 father’s home, and gave him to [Ms.] Patton.” (Resp. 24 (Dkt. No. 46).)

3 Even viewing the evidence in the light most favorable to Plaintiffs, they have failed to
4 make out a claim for negligent investigation. The Washington Supreme Court has rejected the
5 notion of a “general statutory duty of care” for child abuse investigations and has severely
6 limited the scope of the duty to investigate:

7 [A] claim for negligent investigation . . . is available only to children, parents,
8 and guardians of children who are harmed because [the investigating party] has
9 *gathered incomplete or biased information* that results in a *harmful placement*
decision, such as removing a child from a nonabusive home, placing a child in
an abusive home, or letting a child remain in an abusive home.

10 *M.W. v. Dep’t of Soc. & Health Servs.*, 70 P.3d 954, 959, 960 (Wash. 2003) (emphasis added).

11 Plaintiffs’ claim fails in two respects: (1) the officers’ actions did not result in a “harmful
12 placement decision,” and (2) any harm that Plaintiffs endured did not result from the officers
13 “gather[ing] incomplete or biased information” over the course of their investigation.

14 Plaintiffs try to argue that turning D.W. over to his mother was a “harmful placement
15 decision” because Ms. Patton subsequently refused to return D.W. after her scheduled visit was
16 complete. (Resp. 24 (Dkt. No. 46); K. Walker Decl. ¶ 6 (Dkt. No. 47).) Plaintiffs also allege
17 that Mr. Dubose and CPS played a role in keeping D.W. with his mother. (K. Walker Dep.
18 41:21–45:25 (Dkt. No. 48-3 at 10–11).) However, even if these allegations are true, Plaintiffs
19 fail to make any connection between this subsequent dispute and the original decision by
20 Officers Priebe-Olson and Aio to arrange for Ms. Patton to pick up D.W. a few hours early.
21 Ms. Patton was scheduled to collect D.W. at noon on the day of Mr. Walker’s arrest, and
22 nothing suggests that the resulting custody dispute would have been avoided had Ms. Patton
23 waited two hours and picked him up at the originally scheduled time.

24 Moreover, none of the officers’ allegedly negligent acts involved faulty gathering of
25 information. The Court has found genuine issues of material fact as to whether certain of the
26 officers’ actions should have been supported by warrant, and, if confirmed, these actions might

1 constitute serious Fourth Amendment violations; however, the state supreme court has refused
2 to extend liability to all negligent conduct in the course of an investigation. *See M.W.*, 70 P.3d
3 at 956. Instead, parties are liable only for harms that result from gathering *incomplete or biased*
4 information. *Id.* at 960. In this case, the officers were presented an allegation of abuse, and
5 although that allegation did not justify a warrantless entry into Mr. Walker's home, it certainly
6 justified some form of investigation. In the course of that investigation, D.W. disclosed that
7 Mr. Walker had been handling a firearm, which gave the officers probable cause to arrest him
8 as a felon in possession. (*See* Resp. 19 (Dkt. No. 46) (conceding probable cause for the arrest).)
9 Had the officers confronted Mr. Walker and D.W. in public, the same investigation would not
10 have raised Fourth Amendment concerns and would have been beyond reproach. *See Payton*,
11 445 U.S. at 590. Therefore, even if Mr. Walker's arrest did contribute indirectly to his
12 subsequent difficulty in retrieving his son from Ms. Patton, that harm is not actionable under a
13 theory of negligent investigation because his arrest was not based on incomplete or biased
14 information. Accordingly, the Court GRANTS summary judgment as to Plaintiffs' claim of
15 negligent investigation.

16 **III. CONCLUSION**

17 For the foregoing reasons, Defendants' Motion for Summary Judgment (Dkt. No. 33) is
18 DENIED as to Plaintiffs' Fourth Amendment claims of unlawful entry, unlawful arrest, and
19 unlawful search, but the motion is GRANTED as to Plaintiffs' claims of removal without due
20 process and negligent investigation.

21 DATED this 18th day of June, 2009.

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23
24 

25 John C. Coughenour
26 United States District Judge